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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE EASTERN DISTRICT OF CALIFORNIA

8 FIRST NATIONAL INSURANCE COMPANY)
9 OF AMERICA, a Washington) 02:04-cv-836-GEB-JFM
10 corporation,)
11 Plaintiff,)
12 v.) ORDER*
13 MBA CONSTRUCTION, a California)
14 corporation doing business as MACK)
15 CONSTRUCTION; KEVIN D. MACK, an)
16 individual; KATIE BAUGH, an)
17 individual; and DANNY W. BAUGH,)
18 an individual,)
19 Defendants.)
20 _____)

21 Plaintiff seeks \$138,449.68 in attorney fees and related
22 expenses, \$709.62 in travel expenses, and \$14,291.59 in prejudgment
23 interest. (McGowan Supp. Decl. ¶¶ 2-3.) Defendants oppose the
24 motion.

25 BACKGROUND

26 Plaintiff and Defendants entered into a General Agreement
27 for Indemnity ("Indemnity Agreement") whereby Plaintiff agreed to
28 issue a payment bond guaranteeing the obligations of Defendant Mack
Construction for a construction project for the Redding School

* This motion was determined to be suitable for decision without
oral argument. L.R. 78-230(h).

1 District. (Hyslop Decl. ¶¶ 5,9.) In return, Defendants agreed to
2 indemnify Plaintiff for any loss, cost or expense incurred in
3 connection with the payment bond. (Id. ¶ 5, Ex. A.) When several
4 subcontractors on the project submitted claims against the payment
5 bond, Plaintiff paid these subcontractors. (Id. ¶¶ 14-21) Plaintiff
6 requested Defendants reimburse and collateralize Plaintiff for these
7 payments, but Defendants did not reimburse Plaintiff for the claims of
8 two subcontractors, Partition Specialty and Tina's Interior Design
9 Resource. (Id. ¶¶ 15-27.) Plaintiff subsequently filed this action,
10 seeking \$77,728.00 for its payment to Partition Specialty and
11 \$25,237.36 for its payment to Tina's Interior Design Resource, as well
12 as attorney fees, expenses, and prejudgment interest. (Pl.'s Mem. of
13 P. & A. in Support of Postjudgment Mot. for Att'y Fees, Expenses and
14 Prejudgment Interest ("Pl.'s Mem.") at 1.)

15 In April 2005, Plaintiff filed a Motion for Partial Summary
16 Judgment seeking specific performance of the collateral security
17 provisions of the Indemnity Agreement. An Order filed July 22, 2005,
18 held that Plaintiff was not entitled to collateralization for the
19 payment to Tina's Interior Design Resource because a genuine issue of
20 material fact existed as to whether Plaintiff's "alleged interference
21 . . . at least in part caused Plaintiff" to pay the claim. (Order,
22 July 22, 2005, ("July Order") at 5.) However, the July Order held
23 that Plaintiff was entitled to collateralization for the payment to
24 Partition Speciality. Id. An Order filed August 11, 2005, required
25 Defendants to collateralize Plaintiff in the amount of \$77,728.00
26 within twenty (20) days of the date of the Order. (Order, August 11,
27 2005, ("August Order") at 1.)
28

1 On September 8, 2005, pursuant to a stipulation by the
2 parties, judgment was entered against Defendants jointly and severally
3 "in the amount of \$ 102,966.00, exclusive of any recoverable interest,
4 costs or attorney fees." (Stipulation and J. at 3.) The judgment
5 satisfied the August Order that Defendants collateralize Plaintiff in
6 the amount of \$77,728.00. (Id. at 4.) However, the judgment neither
7 waived "Plaintiff's claim for interest, costs, and attorneys' fees,
8 nor any of Defendants' defenses to said claims." (Id. at 3.) The
9 judgment allowed Plaintiff to submit a claim for interest, costs and
10 attorney fees pursuant to Local Rules 52-292 and 52-293, and stated
11 the "Court shall rule on Plaintiff's claims for interest, costs and/or
12 attorneys' fees pursuant to the applicable law, and issue an
13 additional judgment if, and to the extent, the Court finds interest,
14 costs, and/or attorney fees are recoverable." (Id.)

15 DISCUSSION

16 Jurisdiction over this case is premised on diversity of
17 citizenship of the parties. (Pl.'s Complaint ¶ 1.) In diversity
18 actions, state law governs an award of attorney fees, expenses and
19 prejudgment interest. In re Baroff, 105 F.3d 439, 442 (9th Cir.
20 1997); Northrop Corp. v. Triad Int'l Mkt. S.A., 842 F.2d 1154, 1155
21 (9th Cir. 1988). The parties do not dispute that California law
22 applies.¹ Therefore, California law governs whether Plaintiff recovers
23 attorney fees, expenses and prejudgment interest.

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26 ¹ Plaintiff asserts "state law governs" and bases its Motion for
27 Attorney Fees and Prejudgment Interest on California law. (Pl.'s Mem.
28 at 8-9.) Defendants do not explicitly assert that state law governs,
but base their Opposition on California law. (See Defs.' Mem. of P. &
A. in Opp'n ("Defs.' Opp'n") at 5, 11-14, 17-18.)

1 I. Attorney Fees

2 California Code of Civil Procedure § 1021 provides that
3 "[e]xcept as attorney's fees are specifically provided for by statute,
4 the measure and mode of compensation of attorneys and counselors at
5 law is left to the agreement, express or implied, of the parties; but
6 parties to actions or proceedings are entitled to their costs, as
7 hereinafter provided." (West Supp. 2005). Pursuant to California
8 Code of Civil Procedure §§ 1032 and 1033.5, the prevailing party may
9 recover attorney fees as costs when authorized by contract. Scott Co.
10 of Cal. v. Blount Inc., 20 Cal. 4th 1103, 1008-09 (1999). In
11 addition, California Civil Code § 1717(a) states that "[i]n any action
12 on a contract, where the contract specifically provides that
13 attorney's fees and costs, which are incurred to enforce that
14 contract, shall be awarded . . . then the party who is determined to
15 be the prevailing party on the contract . . . shall be entitled to
16 reasonable attorney fees in addition to other costs." (West 1998).
17 Therefore, in order for Plaintiff to recover the attorney fees it
18 seeks, (1) the contract must authorize such fees, (2) Plaintiff must
19 be the prevailing party, and (3) the fees incurred must be reasonable.

20 A. Indemnity Agreement

21 Plaintiff argues that the Indemnity Agreement authorizes an
22 award of attorney fees and related expenses.² (Pl.'s Mem. at 8.)
23 Pursuant to the Indemnity Agreement, Defendants agreed to pay
24 Plaintiff upon demand "[a]ll loss, costs and expenses of whatsoever
25 kind and nature, including court costs, reasonable attorney fees . . .

26
27 ² Defendants do not appear to dispute that the Indemnity
28 Agreement authorizes an award of attorney fees because they acknowledge
that the "Indemnity Agreement calls for reasonable attorney fees."
(Defs.' Opp'n at 6.)

1 and any other losses, costs or expenses incurred by Surety by reason
2 of having executed any Bond, or incurred by it on account of any
3 Default under this agreement" (Hyslop Decl. Ex. A.)
4 According to the Indemnity Agreement, "Default" occurs if a Defendant
5 "[b]reaches, fails to perform, or comply with any provision of this
6 agreement." (Id.) Consequently, because Defendants "fail[ed] to
7 provide the required indemnity and reimbursement owed to Plaintiff,"
8 the Indemnity Agreement authorizes an award of attorney fees and
9 related expenses to Plaintiff. (July Order at 3.)

10 B. Prevailing Party

11 Plaintiff argues it is the prevailing party because "the
12 Stipulation and Judgment clearly provides that Judgment will be
13 entered in favor of Plaintiff in the amount of \$102,966.00." (Pl.'s
14 Mem. at 9.) Plaintiff asserts "Defendants take nothing under the
15 Stipulation and Judgment and make no claim for affirmative relief
16 . . . that could decrease the judgment." (Id.) Defendants argue they
17 are the prevailing party, or alternatively, that no party prevailed
18 because the "results of the litigation are mixed, i.e. the opposing
19 litigants . . . [can] each legitimately claim some success in the
20 litigation." (Defs.' Opp'n at 17.)

21 "When a party obtains a simple, unqualified victory by
22 completely prevailing on or defeating all contract claims in the
23 action and the contract contains a provision for attorney fees,
24 section 1717 entitles the successful party to recover reasonable
25 attorney fees incurred in prosecution or defense of those claims."
26 Scott Co. of Cal., 20 Cal. 4th at 1109. However, if neither party
27 achieves a "complete victory on all the contract claims," the trial
28 court has discretion "to determine which party prevailed on the

1 contract or whether, on balance, neither party prevailed sufficiently
2 to justify an award of attorney fees." Id. To determine whether a
3 party prevailed, "the trial court is to compare the relief awarded on
4 the contract claim or claims with the parties' demands on those same
5 claims and their litigation objectives as disclosed by the pleadings,
6 trial briefs, opening statements, and similar sources." Id.

7 Defendants admit that the judgment against Defendants in the
8 amount of \$102,966, "was equivalent to the Bond claims of Partition
9 Speciality, Inc. for \$77,728.00 and Tina's Interior Design Resource
10 for \$25,237.00 plus 64 cents." (Defs.' Opp'n at 6.) Consequently,
11 through the judgment Plaintiff acquired precisely the relief it
12 sought: reimbursement for Plaintiff's payments to these two
13 subcontractors. Therefore, the results of Plaintiff's "contract
14 claims are not mixed" as Defendants argue because the resolution of
15 the "contract claims is purely good news for one party and bad news
16 for the other." Hsu v. Abbata, 9 Cal. 4th 863, 875-76 (1995).

17 Defendants also argue Plaintiff should not be considered the
18 prevailing party under the equitable doctrine of unclean hands.³
19 (Defs.' Opp'n at 13.) Although "courts should be guided by equitable
20 considerations," when one party obtains an "unqualified win" the other
21 party "may not invoke equitable considerations unrelated to litigation
22 success." Hsu, 9 Cal. 4th at 877. Otherwise, consideration of
23 equitable principals "would convert the attorney fees motion from a
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25 ³ Defendants assert Plaintiff is barred from recovery under the
26 equitable doctrine of unclean hands because (1) Plaintiff interfered
27 with Defendants' ability to receive payments from the Redding School
28 District, (2) Plaintiff paid Tina's Interior Design and Partition
Specialty prematurely, (3) Plaintiff breached the Indemnity Agreement,
not Defendants, (4) Plaintiff refused Defendants' request to stay this
action, and (5) Plaintiff "renege" on a settlement deal to resolve all
outstanding claims on the project. (Defs.' Opp'n at 3-4.)

1 relatively uncomplicated evaluation of the parties' comparative
2 litigation success into a formless, limitless attack on the ethics and
3 character of every party who seeks attorney fees." Id. at 877.
4 Consequently, when the "results of the litigation on the contract
5 claims are not mixed . . . a trial court has no discretion to deny
6 attorney fees to the successful litigant." Id. at 876-77. Since
7 Plaintiff has achieved an "unqualified victory," Defendants' argument
8 that Plaintiff should be denied attorney fees on account of equitable
9 considerations unrelated to litigation success is unavailing. Id.
10 Therefore, Plaintiff is the prevailing party and may recover
11 reasonable attorney fees.

12 C. Reasonable Fees

13 Plaintiff argues that the \$138,449.68 in attorney fees and
14 related expenses and the \$709.62 in travel expenses Plaintiff incurred
15 to enforce the Indemnity Agreement are reasonable.⁴ (Pl.'s Mem. at 10;
16 McGowan Supp. Decl. ¶ 3.) Defendant contends "the attorney fees are
17 unquestionably unreasonable" and "travel expenses are not recoverable"
18 in a motion for attorney fees. (Defs.' Opp'n at 9,17.) "[G]eneral
19 rules [have been developed] to guide the exercise of . . . [the
20 court's determination of] a reasonable fee." People ex rel. Dept. of
21 Transp. v. Yuki, 31 Cal. App. 4th 1754, 1767 (1995). "The starting
22 point in determining a reasonable fee is a calculation of the
23 attorney's services in terms of the time he or she has expended on the
24 case." Id.; PLCM Group v. Drexler, 22 Cal. 4th 1084, 1095 (2000)

26 ⁴ Plaintiff states that the amount of attorney fees and related
27 expenses were calculated by taking the total amount of fees and expenses
28 incurred through October 31, 2005, and deducting \$3,797.44, which was
submitted separately in a Bill of Costs filed September 21, 2005.
(McGowan Supp. Decl. at 2, n. 1.)

1 ("California courts have consistently held that a computation of time
2 spent on a case and the reasonable value of that time is fundamental
3 to a determination of an appropriate attorneys' fee award.").
4 However, the amount of the award can be adjusted "based on
5 consideration of factors specific to the case, in order to fix the fee
6 at the fair market value for the legal services provided."⁵ PCLM
7 Group, 22 Cal. 4th at 1095.

8 Defendants argue Plaintiff's attorney fees and expenses are
9 unreasonable because the case was "relatively simply and [did] not
10 require special skills." (Defs.' Opp'n at 10.) In addition,
11 Defendants contend Plaintiff "did nothing more than prepare (1) a
12 boilerplate Motion to Dismiss [Defendants' First Amended Counterclaim]
13 . . .; (2) a Motion for Partial Summary Judgment . . .; and (3) oppose
14 [Defendants'] Motion to Stay Proceedings During the Pendency of the
15 State Court Action." (Defs.' Opp'n at 8.) Plaintiff responds that
16 the attorney fees and expenses are reasonable because of "the
17 aggressive pleadings and motions filed by Defendants . . . and the
18 fact that the Stipulation and Judgment was reached on a date so close
19 to the scheduled trial date." (Pl.'s Reply at 20.) In addition,
20 Plaintiff argues the Motion to Dismiss was "hardly boilerplate," and
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22 ⁵ The court may consider (1) the novelty and difficulty of the
23 questions involved and the skill required to perform the legal services
24 properly, (2) the likelihood that the acceptance of this particular
25 employment would preclude other employment by the attorneys, (3) the
26 amount involved and the results obtained, (4) the time limitations
27 imposed by the client or by the circumstances of the case, (5) the
28 nature and length of the professional relationship with the client, (6)
the experience, reputation, and ability of the attorneys who performed
the services, (7) whether the fee is fixed or contingent, (8) the time
and labor required of the attorneys, and (9) the informed consent of the
client to the fee agreement. Glendora Cmty. Redevelopment Agency v.
Demeter, 155 Cal. App. 3d 465, 474 (1984); PCLM Group, 22 Cal. 4th at
1096.

1 the "Motion for Partial Summary Judgment was . . . laborious, due to
2 the extensive evidentiary objections and other arguments . . . by
3 Defendants in Opposition." (Id.) Plaintiff also asserts that "these
4 motions [were] not the only tasks performed by Plaintiff during the
5 sixteen months that the parties litigated this matter." Plaintiff
6 contends that "[a]mong other legal work, Defendants ignore the trial
7 preparation, the preparation and taking of a deposition, the attempts
8 to obtain written discovery from Defendant [sic], the attempts to
9 enter a collateral agreement, and necessary joint statements and other
10 tasks required of any party in litigation." (Id. 20-21.)

11 A review of all the documents filed in this action and the
12 declarations and exhibits submitted by Plaintiff detailing the hours
13 worked by counsel on each particular matter, reveals that a
14 considerable amount of time and effort was required of Plaintiff's
15 counsel to successfully litigate this action. Although Plaintiff's
16 counsel spent significant time filing a Motion to Dismiss, a Motion
17 for Partial Summary Judgment, and a Motion in Opposition to
18 Defendants' Motion to Stay Proceedings, all of these motions were
19 decided in whole or in part in favor of Plaintiff. In addition, most
20 of the other tasks performed by Plaintiff's counsel, such as
21 requesting written discovery, preparing for and conducting a
22 deposition, and engaging in negotiations with Defendants regarding
23 settlement, appear to have contributed to the eventual resolution of
24 this litigation. Finally, although Plaintiff's counsel spent
25 considerable time in August 2004 and September 2004 preparing for
26 trial, that amount of time appears reasonable because judgment was
27 entered against Defendants only a few weeks prior to the trial date of
28 September 27, 2005. Therefore, Plaintiff is awarded the attorney fees

1 associated with these hours because the majority of the time billed by
2 Plaintiff's counsel was reasonable.

3 Defendants also object to the time billed by Plaintiff's
4 counsel on certain tasks. First, Defendants argue that the time
5 Plaintiff's counsel spent preparing the Motion for Attorney Fees is
6 not reasonable.⁶ (Defs.' Opp'n at 6.) Plaintiff responds that these
7 fees are reasonable because the motion "includes a mix of legal
8 argument and factual presentation that required the significant
9 attorney time documented" due to "the vast array of substantive and
10 procedural argument raised by Defendants in their Opposition." (Pl.'s
11 Reply at 21.) Although Plaintiff's counsel expended considerable time
12 preparing the Motion for Attorney Fees and the Reply, these hours
13 appear reasonable in light of the time necessary to file the briefs,
14 to prepare the supporting declarations, to explain month-by-month what
15 fees were incurred and why, and to compile all the invoices, billing
16 statements, and other supporting documents. Therefore, Plaintiff is
17 awarded the fees associated with these hours.

18 Second, Defendants contend Plaintiff should not recover the
19 attorney fees Plaintiff incurred while defending actions in state
20 court by other payment bond claimants and the California State
21 Department of Labor Standards Enforcement. (Defs.' Opp'n at 18.)
22 Plaintiff argues that the Indemnity Agreement allows Plaintiff to
23 recover attorney fees incurred "in defending against claims against
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25 ⁶ At the time Defendants filed their Opposition, Defendants
26 argued that Plaintiff counsel's estimate of "\$14,980.00 (to prepare the
27 motion for attorney fees) . . . is not reasonable." (Defs.' Opp'n
28 at 6.) However, after Defendants filed their Opposition, Plaintiff
incurred additional attorney fees due to the preparation of the Reply
brief. (McGowan Supp. Decl. ¶ 2.) According to the invoice submitted
by Plaintiff, the final amount of attorney fees and expenses incurred
for both the Motion and Reply total \$26,008.63. (Id. Ex. A.)

1 the bonds Plaintiff issues on behalf of Defendant Mack Construction."
2 (Pl.'s Mem. at 12.) Plaintiff contends that the attorney fees
3 incurred defending the state court actions are recoverable because
4 they "were incurred as a result of issuing the [b]onds" pursuant to
5 its obligations under the Indemnity Agreement. (Id. at 12.)

6 Although the attorney fees were incurred in connection with
7 separate state court cases, these fees are closely related to this
8 action because they were incurred by Plaintiff while defending the
9 same payment bond that is the subject of this litigation. "[A] trial
10 court may, in its discretion, determine that time reasonably expended
11 on an action includes time spent on other separate but closely related
12 court proceedings." Wallace v. Consumers Cooperative of Berkeley,
13 Inc., 170 Cal. App. 3d 836, 849 (1985); Children's Hosp. and Medical
14 Center v. Bonta, 97 Cal. App. 4th 740, 779 (2002) ("California case
15 law clearly provides a trial court discretion to award a fee that
16 compensates work performed in a collateral action that may not have
17 been absolutely necessary to the action in which fees are awarded").
18 Therefore, Plaintiff is awarded the attorney fees associated with the
19 state court actions.

20 Third, Defendants argue that Plaintiff should not recover
21 the legal fees of Bennett Lee prior to his admission to the California
22 State Bar. (Defs.' Opp'n at 9.) In its Reply, Plaintiff withdrew its
23 claim for the fees billed by Bennett Lee prior to his admission to the
24 State Bar on May 24, 2004. (Pl.'s Reply at 21-22.) Therefore, the
25 attorney fees sought by Plaintiff are reduced by \$5,704.00, the amount
26 billed for the services of Bennett Lee from March 8, 2004, through May
27 23, 2004. (Lee Reply Decl. ¶ 10.)

1 Fourth, Defendants contend Plaintiff should not recover
2 \$709.62 in travel expenses. (Defs.' Opp'n ¶ 17.) Plaintiff argues it
3 should recover these travel expenses because they were incurred by
4 Nicholas Hyslop while visiting the offices of Defendant Mack
5 Construction. (Pl.'s Reply at 18.) However, the declaration of
6 Nicholas Hyslop does not discuss who incurred the expenses, how these
7 expenses were incurred, or when the expenses were incurred, and the
8 exhibits attached to the declaration do not document these expenses.
9 Rather, the declaration merely includes a chart with an entry for
10 "travel" and the amount of "709.62." (Hyslop Decl. ¶ 19.) Without
11 any discussion of or documentation for these expenses, it cannot be
12 said that the expenses incurred were reasonable. Accordingly,
13 Plaintiff cannot recover \$709.62 in travel expenses.

14 In addition, some of the time spent on this litigation by
15 Plaintiff's counsel does not appear reasonable. On April 27, 2005,
16 Plaintiff filed a Motion for Reconsideration, requesting that the
17 Court revisit an Order filed April 27, 2005, which continued the
18 hearing on Plaintiff's Motion for Partial Summary Judgment. An Order
19 filed April 29, 2005, denied Plaintiff's Motion for Reconsideration.
20 (Order, April 29, 2005, at 2.) The Order noted Plaintiff could have
21 opposed Defendants' request for a continuance during "the prescribed
22 time for filing a reply brief," but "Plaintiff did not respond to
23 that request." (Id.) In addition, the Order observed Plaintiff "did
24 not explain why it could not have opposed the continuance request in a
25 timely filed reply brief." (Id.) Instead, Plaintiff devoted "nearly
26 two-thirds of Plaintiff's fourteen page motion" to arguments that
27 "should have been set forth in a . . . reply brief." (Id. at 2,
28 n. 3.) On May 3, 2005, Plaintiff filed a letter dated April 29, 2005,

1 stating that the "untimeliness of Plaintiff's Reply and objection is
2 due to the fault of counsel . . . for failure to properly calendar the
3 deadline for the Reply." (Letter from Kirsten Roe, Watt, Tieder,
4 Hoffar & Fitzgerald, L.L.P, to the Honorable Garland E. Burrell, Jr.,
5 (April 29, 2005) at 1.) Therefore, the attorney fees sought by
6 Plaintiff are reduced by \$593.00 because the time spent on these
7 filings was due to the fault of Plaintiff's counsel.⁷

8 Finally, a review of the invoices and billing statements
9 submitted by Plaintiff reveals that Plaintiff miscalculated the total
10 amount of attorney fees and expenses incurred during this litigation.
11 Plaintiff seeks \$138,449.68 in attorney fees and related expenses
12 incurred from March 8, 2004, through October 31, 2005. (McGowan Supp.
13 Decl. ¶ 3.) Plaintiff appears to have calculated this amount by
14 adding \$99,997.10, the amount of attorney fees and expenses it
15 incurred through September 30, 2005, and \$38,452.58, the total amount
16 billed by its counsel on the November 6, 2005, invoice. (Lee Decl.
17 ¶ 3; McGowan Supp. Decl. Ex. A.) The total amount on the invoice
18 includes \$26,008.63 for fees and expenses incurred in October 2005,
19 and a previous balance of \$12,443.95 for work performed in September
20 2005. (McGowan Supp. Decl. Ex. A.) However, the previous balance for
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22 ⁷ This amount was calculated as follows: \$161.00 was deducted
23 because Bennett Lee billed .70 hour at \$230.00 per hour for tasks
24 associated with the Motion for Reconsideration. (Lee Decl., Ex. A.)
25 Specifically, on April 12, 2005, Bennett Lee billed .60 hour to respond
26 to Defendants' request for a continuance, and on April 14, 2005, he
27 billed .10 hour to define a plan of action in response to the request
28 for a continuance. (Id.) In addition, \$432.00 was deducted because
Kirsten Roe billed 2.4 hours at \$180.00 per hour for tasks associated
with the Motion for Reconsideration. (Id.) Specifically, on April 14,
2005, Kirsten Roe billed .40 hour to prepare correspondence relating to
the hearing date, on April 15, 2005, she billed 1.5 hours to prepare a
stipulation to move the hearing date, and on April 20, 2005, she billed
.50 hour to strategize about the preparation of a reply. (Id.)

1 work performed in September 2005 is already included in the \$99,997.10
2 for attorney fees and expenses incurred through September 30, 2005.
3 (Lee Ex. A.) Therefore, the attorney fees and expenses sought by
4 Plaintiff are reduced by \$12,443.95 in order to accurately reflect the
5 total amount of fees Plaintiff incurred during this litigation.

6 Consequently, the \$138,449.68 in attorney fees and expenses
7 sought by Plaintiff are reduced (1) by \$5,704.00 for the services
8 performed by Bennett Lee prior to his admission to the California
9 State Bar (2) by \$593.00 for time not reasonably expended due to the
10 fault of counsel, and (3) by \$12,443.95 to accurately reflect the
11 amounts billed. In addition, Plaintiff cannot recover \$709.62 in
12 travel expenses because Plaintiff did not demonstrate that these
13 expenses were reasonable. Therefore, Plaintiff shall recover a total
14 of \$119,708.73 for attorney fees and expenses.

15 II. Prejudgment Interest

16 Plaintiff requests \$14,291.59 in prejudgment interest, "on
17 the grounds that the damages awarded to Plaintiff were sum-certain
18 payments which, under California law, entitled a judgment creditor to
19 prejudgment interest." (Pl.'s Mem. at 13.) Defendant does not raise
20 any arguments in response to this request. "[A] plaintiff is entitled
21 to recover [prejudgment] interest where damages resulting from a
22 breach of contract 'are capable of being made certain by
23 calculation.'" Camrosa County Water Dist. v. Southwest Welding & Mfg.
24 Co., 49 Cal. App. 3d 951, 958 (1975) (quoting California Civil Code §
25 3287). Plaintiff paid Tina's Interior Design Resources \$77,728.00 and
26 Partition Speciality \$25,237.36 "only after a due investigation by
27 First National of the claim, and, notably, after Mack Construction
28 already expressly admitted that payment in that sum or approximate sum

1 was due to the respective claimant." (Hyslop Decl. ¶¶ 21-25.)
2 Plaintiff paid Partition Speciality on April 12, 2004, and Tina's
3 Interior Design Resource on August 31, 2004. (McGowan Decl. Ex. A.)
4 After each payment was made, Plaintiff requested Defendants to
5 reimburse it for the amounts Defendants admitted were owing. (Hyslop
6 Decl. ¶ 15.) Therefore, at the time the payments were made, the
7 damages were "certain, or capable of being made certain by
8 calculation." California Civil Code § 3287(a) (West 1997).

9 According to the Indemnity Agreement, Defendants agreed to
10 pay Plaintiff "interest on all disbursements made by Surety in
11 connection with such loss, costs and expenses incurred by Surety at the
12 maximum rate permitted by law calculated from the date of each
13 disbursement." (Hyslop Decl. Ex. A.) When a contract does not provide
14 a legal rate of interest, California Civil Code § 3289 dictates that
15 "the obligation shall bear interest at a rate of 10 percent per annum
16 after a breach." (West 1997). Applying a 10 percent interest rate to
17 Plaintiff's payments to Partition Speciality and Tina's Interior Design
18 Resource equals \$13,525.63 in prejudgment interest.⁸ (McGowan Decl.
19 ¶ 2, Ex. A.) Therefore, Plaintiff is awarded \$13,525.63 in prejudgment
20 interest for the payments to these two subcontractors.

23 ⁸ The amount of prejudgment interest was calculated as follows:
24 Plaintiff paid Partition Specialty on April 12, 2004. (McGowan Decl.
25 Ex. A.) Thus, 514 days elapsed between the date of payment and
26 September 8, 2005, the date Judgment was entered. (Id.) Applying a
27 daily interest rate of 10% per year equals \$10,948.20 in prejudgment
28 interest for the payment to Partition Speciality. (Id.) Plaintiff paid
Tina's Interior Design Resources on August 31, 2004. (Id.) Thus, 373
days elapsed between the date of payment and the date Judgment was
entered. (Id.) Applying a daily interest rate of 10% year equals
\$2,577.43 in prejudgement interest for the payment to Tina's Interior
Design Resource.

1 In addition, it appears Plaintiff seeks prejudgment interest
2 for payments made to its counsel for attorney fees. (McGowan Decl. Ex.
3 A.) However, Plaintiff has not adequately identified or properly
4 documented these payments. Plaintiff only provides a chart identifying
5 the payment dates, the payee as "WTHF," and the amounts paid. (McGowan
6 Decl. Ex. A.) However, it is unclear what the amounts on the chart
7 represent because they do not correspond to the amounts charged by
8 Plaintiff's counsel for attorney fees. (Compare id., with Lee Decl.
9 Ex. A.) Therefore this request is denied.

10 CONCLUSION

11 For the stated reasons, Plaintiff is awarded to \$119,708.73
12 for attorney fees and related expenses and \$13,525.63 for prejudgment
13 interest.

14 IT IS SO ORDERED.

15 DATED: December 12, 2005

16 /s/ Garland E. Burrell, Jr.
17 GARLAND E. BURRELL, JR.
18 United States District Judge
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